Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL COURT NO S5-22-655 OF 1996

ABDUL MALIK ISHAK J

23 OCTOBER 2002

Civil Procedure *— Stay of execution of judgment — Application for — Whether special circumstances existed — Whether defendant had demonstrated by affidavit evidence a combination of determining factors to warrant a stay of execution*

Contract *— Damages — Breach of contract — Appeal against award — Mitigation — Whether damages suffered by plaintiff were damages that arose naturally in accordance 'to the usual course of things from the breach' — Project could only proceed with defendant's participation — Whether mitigation was applicable*

The defendant had agreed to its land being developed by the plaintiff together with the adjoining parcels of land thereat into a comprehensive development. The plaintiff's role was to obtain the approval from the Dewan Bandaraya Kuala Lumpur ('DBKL') for the comprehensive development and to obtain sub-division in accordance with the agreed layout. In return, a certain number of approved buildable lots on the land belonging to DBKL would be transferred to the defendant and the plaintiff. The plaintiff alleged that the defendant refused to carry out its obligations. According to the plaintiff, if the defendant had complied with its end of the bargain, the comprehensive project contemplated by the parties would have been completed and the parties would have received their respective entitlements. The plaintiff proceeded to file the present suit against the defendant and prayed for the order of specific performance of the variation agreement and also for damages. The judge found that the defendant had refused to execute the supplementary agreement and carry out its obligations in the variation agreement. The High Court judge found the defendant liable for the breach of the variation agreement and ordered specific performance of the variation agreement and additionally, damages for breach of the variation agreement. The judge ordered damages to be assessed by the senior assistant registrar ('the SAR'). The plaintiff's expert witnesses quantified that the plaintiff had sustained substantial damages of RM10.5m. The SAR accepted this amount and awarded the said sum in favour of the plaintiff. The defendant appealed (in encl 75) against the decision of the SAR in awarding damages of RM10.5m to the plaintiff. Meanwhile, the defendant appealed against the decision of the High Court judge but the appeal was yet to be heard by the Court of Appeal. The defendant further applied (in encl 77) for a stay of the SAR's decision in regard to the damages awarded to the plaintiff.

Held, dismissing both encls 75 and 77: A

(1) The damages suffered by the plaintiff as a result of the defendant failing to perform the project agreement and breaching the variation agreement were in relation to the loss of the plaintiff's entitlements. Evidence was adduced by the plaintiff that the damages comprised the loss of profits that would have accrued B to the plaintiff if not for the defendant's conduct and breach (see p 133A–B, D).

(2) In respect of the submission by the defendant's counsel that the plaintiff was given 'two bites at the cherry' in that it was awarded damages arising out of the breach of the variation agreement and C granted specific performance of the variation agreement, regard must be had to s 74(1) of the Contracts Act 1950 ('the Act'), which empowered the court to order damages for breach of contract. Further, s 18(2) of the Specific Relief Act 1950 must also be taken into account as that section enacted that the court may, upon the application by any person for specific performance, D grant compensation if specific performance ought not to be granted. In any case, this court was not concerned with the defendant's submission on this issue as it was a matter to be decided by the Court of Appeal. The matter to be considered in encl 75 was not the issue of liability but rather, damages E (see pp 137C, 138G–H, 142I–143A).

(3) From the evidence adduced before the SAR, the damages suffered by the plaintiff were damages that arose naturally in accordance 'to the usual course of things from the breach'. This meant that if the defendant had duly executed the supplementary agreement and carried out its obligations, the plaintiff would have proceeded F to obtain the relevant plots of land and would have built on the same plot in order to reap the profits. Since the defendant did not lead any evidence before the SAR, the testimonies of the plaintiff's witness must be accepted (see pp 140C–D, 142B).

(4) Although an innocent party to a breached contract must mitigate G its losses, mitigation was not applicable in the instant case as the project in question was comprehensive in nature and could only proceed with the defendant's participation. Moreover, the duty to prove mitigation was on the part of the defendant. Here, the defendant had failed to discharge that duty before the SAR H (see pp 145C–D, 146D).

(5) In considering whether an application for a stay of execution, the special circumstances approach should be adopted and applied and the onus was on the defendant to show special circumstances. Special circumstances meant a combination of determining factors as demonstrated by affidavit evidence. The grounds raised I by the defendant in its affidavit to stay the execution were, inter alia: (a) a large sum of damages had been awarded; (b) hardship

and inability to operate the defendant's business; (c) an appeal had been made under encl 77; (d) an appeal had been made to the Court of Appeal; (e) the plaintiff was poor and there was a risk of dissipation; (f) the defendant was unable to pay and its only asset was the land concerned and the plaintiff would take steps to proceed with the seizure of the same; and (g) the appeal to the Court of Appeal, if successful, would be rendered nugatory. These grounds were not sufficient to show that there were special circumstances (see pp 148G–I, 150C–151A, 152G, 153D, 154B).

[**Bahasa Malaysia summary**

Defendan telah bersetuju bahawa tanahnya akan dimajukan oleh plaintif bersama-sama bidang tanah bersebelahan di situ kepada satu pembangunan komprehensif. Peranan plaintif adalah untuk memperolehi kelulusan dari Dewan Bandaraya Kuala Lumpur ('DBKL') untuk pembangunan komprehensif dan untuk memperolehi pembahagian kecil menurut susunan the agreed layout. Sebagai balasan, sebilangan lot yang diluluskan boleh dibina tertentu atas tanah tersebut kepunyaan DBKL akan dipindahmilik kepada defendan dan plaintif. Plaintif mengata bahawa defendan enggan menjalankan kwajipannya. Menurut plaintif, sekiranya defendan telah menepati janjinya, projek komprehensif yang dicadangkan oleh pihak-pihak sudah tentu siap dan pihak-pihak akan menerima hak mereka masing-masing. Plaintif terus memfail guaman ini terhadap defendan dan memohon perintah perlaksanaan spesifik perjanjian ubahsuian dan juga untuk ganti rugi. Hakim mendapati bahawa defendnan enggan melaksana perjanjian tambahan dan melaksan kewajipannya dalam perjanjian ubahsuaian. Hakim Mahkamah Tinggi mendapati bahawa defendan bertanggungjawab atas kemungkiran perjanjian ubahsuaian dan memerintah perlaksanaan spesifik perjanjian ubahsuaian dan lebih daripada itu, ganti rugi untuk kemungkiran perjanjian ubahsuaian. Hakim memerintah ganti rugi ditaksir oleh penolong kanan pendaftar ('PKP'). Saksi-saksi pakar plaintif mengira bahawa plaintif telah menanggung kerugian substantial sebanyak RM10.5j. PKP menerima amaun ini dan mengawardkan jumlah tersebut kepada plaintif. Defendan merayu (dalam lamp 75) terhadap keputusan PKP dalam memberi ganti rugi sebanyak RM10.5j kepada plaintif. Sementara itu, defendan merayu terhadap keputusan hakim Mahkamah Tinggi tetapi rayuan belum didengar oleh Mahkamah Rayuan. Defendan seterusnya memohon (dalam lamp 77) untuk penggantungan keputusan PKP berhubung dengan ganti rugi yang diawardkan kepada plaintif.

Diputuskan, menolak kedua-dua lamp 75 dan 77:

(1) Kerugian yang ditanggung oleh plaintif akibat kegagalan defendan untuk melaksana perjanjian projek dan memungkiri perjanjian ubahsuian adalah berkaitan dengan kehilangan hak

plaintif. Keterangan dikemukakan oleh plaintif bahawa kerugian terdiri daripada kehilangan keuntungan yang akan terakru kepada plaintif jika bukan untuk kelakuan dan kemungkiran defendan (lihat ms 133A–B, D). A

(2) Berhubung dengan hujah oleh peguam defendan bahawa plaintif diberi 'two bites at the cherry' dalam ertikata ia diawardkan ganti rugi yang timbul daripada kemungkiran perjanjian ubahsuian dan diberi perlaksanaan spesifik perjanjian ubahsuaian, timbangan mestilah diambil ke atas s 74(1) Akta Kontrak 1950 ('Akta tersebut'), yang memberikuasa mahkamah memrintah ganti rugi untuk kemungkiran kontrak. Seterusnya, s 18(2) Akta Relief Spesifik mestilah diambil kira kerana seksyen itu menggubal bahawa mahkamah boleh, atas permohonan oleh sesiapa untuk perlaksanaan spesifik, memberi pampasan sekiranya perlaksanaan spesifik seharusnya tidak diberikan. Walau bagaimanapun, mahkamah ini tidak mempedulikan hujah defendan atas isu ini kerana ia merupakan perkara untuk diputuskan oleh Mahkamah Rayuan. Perkara untuk ditimbang dalam lamp 75 bukanlah isu liabiliti tetapi sebaliknya, ganti rugi (lihat ms 137C, 138G–H, 142I–143A). B C D

(3) Dari keterangan yang dikemukakan di hadapan PKP, kerugian yang ditanggung oleh plaintif adalah kerugian yang timbul secara semula jadi menurut 'to the usual course of things from the breach'. Ini bermaksud bahawa sekiranya defendan telah melaksana perjanjian tambahan seperti yang sewajarnya dan menjalankan kewajpannya, plaintif tentu akan terus memperolehi plot tanah relevan dan akan membina atas plot yang sama bagi mengaut keuntungan. Oleh kerana defendan tidak mengemuka apa-apa keterangan di hadapan PKP, keterangan saksi-saksi plaintif mesti diterima (lihat ms 140C–D, 142B). E F

(4) Walaupun suatu pihak yang tidak bersalah kepada satu kontrak mesti mengurang kerugiannya, prinsip ini tidak terpakai dalam kes in kerana projek berkenaan adalah bersifat komprehensif dan hanya boleh terus dengan penyertaan defendan. Tambahan pula, kewajipan membukti mitigasi terletak pada pihak defendan. Di sini, defendan telah gagal melepaskan kewajipan itu di hadapan PKP (lihat ms 145C–D, 146D). G

(5) Dalam menimbang permohonan penggantungan perlaksanaan, keadaan isitimewa mesti diterimapakai dan digunakan dan beban terletak pada defendan untuk menunjuk keadaan istimewa. Keadaan istimewa bermaksud kombinasi faktor penentuan seperti yang ditunjukkan oleh keterangan afidavit. Alasan yang dibangkitkan oleh defendan dalam afidavitnya untuk menggantung perlaksanaan adalah, antara lain: (a) jumlah besar ganti rugi telah diawardkan; (b) kesukaran dan ketidakupayaan untuk mengendali perniagaan defendan; (c) satu rayuan telah dibuat di bawah lamp 77; (d) satu rayuan telah dibuat kepada H I

Mahkamah Rayuan; (e) plaintif adalah miskin dan wujudnya risiko pelupusan; (f) defendan tidak dapat membayar dan satu-satunya aset adalah tanah berkenaan dan plaintif akan mengambil langkah untuk meneruskan rampasan yang sama; dan (g) rayuan kepada Mahkamah Rayuan, andainya berjaya, akan dijadikan tidak penting. Alasan-alasan ini tidak mencukupi untuk menunjuk keadaan istimewa (lihat ms 148G–I, 150C–151A, 152G, 153D, 154B).]

Notes

For cases on application for stay of execution of judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5460–5498.

Forcases on damages for breach of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2456.

Cases referred to

All Persons in Occupation of the House and the Wooden Stores Erected on Portion of Land Held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533 (refd)

Atkins v GW Ry (1886) 2 TLR 400 (refd)

Beckwith v Sydebotham (1807) 1 Camp 116 (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Chandrasekaran v PP [1971] 1 MLJ 153 (refd)

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (refd)

Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)

Davie v Edinburgh Magistrates (1853) SC 34 (refd)

Eng Yam Construction Sdn Bhd v TAP Properties Sdn Bhd 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1363 (refd)

Folkes v Chadd (1782) 3 Doug KB 157 (refd)

Hopes and Lavery v HM Advocate (1960) JC 104 (refd)

Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd [1995] MLJU 489 (refd)

Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd (No 2) [2000] MLJU 232 (refd)

Jaafar bin Shaaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)

Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493 (folld)

Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119 (folld)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (folld)

Kong Nen Siew v Lim Siew Hong [1971] 1 MLJ 262 (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (refd)

Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd [2000] 3 MLJ 310 (distd)
Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan; Leong Yok Chin (Intervener) [1996] 4 CLJ 256 (refd)
Monk v Bertram [1891] 1 QB 346 (refd)
Ong Seok Heng v Wee Cheong Motor & Housing Developer Sdn Bhd [1990] 2 CLJ 1007 (refd)
PP v Muhamed bin Sulaiman [1982] 2 MLJ 321 (refd)
R v Murphy [1980] QB 434; [1980] 2 All ER 325 (refd)
R v Oakley (1979) RTR 417 (refd)
R v Silverlock (1894) 2 QB 766 (refd)
Roper & Anor v Johnson (1872–73) 8 Hilary Term 36 Vict 167 (refd)
Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin [2000] 5 MLJ 39 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (not folld)
Soosan Trading Co Ltd v Tawau Auto Sdn Bhd [1997] 4 CLJ Supp 519 (refd)
Strutt v Whitnell & Anor [1975] 1 WLR 870 (refd)
Tac Construction & Trading v Bennes Engineering (No 2) [1999] 2 CLJ 518 (refd)
TC Trustees Ltd & Anor v JS Darwen (Successors) Ltd [1969] 2 QB 295 (refd)
Tan Geok Khoon & Gerald Francis Robless v Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)
Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)
Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171 (refd)
Tneoh Hong Seng @ Teoh Hong Seng v Dayani Sdn Bhd [1998] 2 AMR 1066 (refd)
Tropiland Sdn Bhd v DCB Bank Bhd & Ors [2000] 2 MLJ 65 (refd)
White v HM Advocate (1986) SCCR 274 (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224 (refd)
Yun Hing (Sabah) Sdn Bhd v Sandakan Plywood & Veneers Co Sdn Bhd [1995] 1 MLJ 339 (refd)

Legislation referred to

Contracts Act 1950 s 74(1)
Courts of Judicature Act 1964 s 73
Rules of the Court of Appeal 1994 r 13
Rules of the High Court 1980 O 20 r 5, O 56 r 1(4)
Specific Relief Act 1950 s 18(2)

Gerard Louis Ambrose (*Chooi & Co*) for the plaintiff.
Balan S Nair (*Seah Balan Ravi & Co*) for the defendant.

Abdul Malik Ishak J:

Introduction

Two relevant enclosures will be considered in this judgment. The first would be encl 75 which was an appeal by the defendant against the decision of the learned senior assistant registrar ('SAR') in the person of Madam Wan Azizon binti Ahmad when she awarded the plaintiff judgment against the defendant in the sum of RM10,500,000 together with interest at the rate of 8%pa from 18 December 1996 to the date of full realization and costs of the entire proceedings. The learned SAR assessed damages after James Foong J had decided on the issue of liability in favour of the plaintiff and had ordered that damages be assessed. The defendant had since filed an appeal against the decision of James Foong J and the Court of Appeal has yet to hear that appeal. In encl 75, 1 was only concerned about the issue of damages which the learned SAR had ordered in favour of the plaintiff and nothing else.

Another relevant enclosure under consideration in this judgment would be that of encl 77 which was basically an application for a stay of the learned SAR's decision in regard to the damages which she had awarded in favour of the plaintiff.

I would consider these two enclosures in succession.

Enclosure 75

I will now allude to the salient facts. There were three parcels of lands and these lands have common boundaries, namely:

(a) The part that was edged in yellow highlight would be Lot 4451 and this was owned by the defendant (see exh P6 of the bundle of documents). While the part that was marked in pink stripes on the defendant's land had been acquired by the Government and now it is owned by the Dewan Bandaraya Kuala Lumpur ('DBKL').

(b) The land at the bottom of the defendant's land would be Lot 446 and that was owned by the plaintiff's sister company known as DLC Properties Sdn Bhd (see exh P7 of the bundle of documents).

(c) The land to the left side surrounding the part marked in pink stripes which included the parts marked in pink stripes were owned by DBKL.

Now, the plaintiff and the defendant had simultaneously entered into several agreements, namely, the agreement dated 23 May 1990 (see exh P8 of the bundle of documents), the memorandum of understanding dated 23 May 1990 (see exh P9 of the bundle of documents), the acknowledgment and agreement dated 23 May 1990 (see exh P10 of the bundle of documents) and the power of attorney dated 23 May 1990 (see exh P11 of the bundle of documents). For ease of reference, all these agreements will hereinafter be collectively referred to as the 'project agreement'. It must be emphasized that the project agreement had lapsed

and so the defendant had requested for its renewal. The defendant and the plaintiff then proceeded to negotiate for the renewal of the project agreement which finally culminated in the mutual variation of the terms and conditions of an agreement captioned as the supplementary agreement dated 23 December 1995. Recital A.1 of the supplementary agreement in exh P12 of the bundle of documents clearly sets out the substance of the project agreement and the supplementary agreement. Basically, it was like this. That at the request of the defendant, the defendant's land was to be developed by the plaintiff together with the adjoining parcels of lands into a comprehensive development including a multi-storey market, car park and shop offices. It was a multi-faceted development.

It must be borne in mind that the nature and consequences of the project were not only stipulated in the project agreement and supplementary agreement as seen in the layout plan at pp 13 and 141 of the bundle of documents, it was also alluded to by Datuk David Chua in cross-examination where he testified before the learned SAR that the project was explained to the defendant in Hokkien — a Chinese dialect, which Datuk David Chua and the defendant's representative spoke and understood. James Foong J in his judgment alluded to the fact that although the terms and conditions of the supplementary agreement had come into existence as early as November 1995, the defendant refused to execute the supplementary agreement and to carry out its obligations. The plaintiff then proceeded to file the present suit and adduced all the affidavit evidence pertaining to the negotiations and the correspondences before James Foong J and the learned judge found (see the unreported written judgment dated 12 August 1997) that the supplementary agreement had in fact come into existence in November 1995 pursuant to a variation agreement. In fact, the variation agreement constituted all the correspondences between the parties confirming that the supplementary agreement had been agreed upon and that the supplementary agreement was to be executed. Thus, the terms and conditions of the variation agreement would be the following — the terms and conditions of the supplementary agreement and together with an additional term, namely, that the supplementary agreement would be executed. On 12 August 1997, James Foong J found that the defendant had refused to, inter alia, execute the supplementary agreement and to carry out its obligations in the variation agreement as set out in the supplementary agreement. So, James Foong J found, on 12 August 1997, that liability should be placed on the shoulders of the defendant for breach of the variation agreement and accordingly the learned judge ordered, inter alia, specific performance of the variation agreement and additionally damages for breach of the variation agreement. It was because of the breach of the variation agreement that the plaintiff was unable to develop the parcels of the lands belonging to DBKL, the plaintiff's sister company and the defendant into a comprehensive development which was approved for development (see exhs P14 to P24 of the bundle of documents).

The expert quantified that the plaintiff had sustained substantial damages in the sum of RM10,500,000 and this was accepted by the learned SAR. It must be borne in mind that the agreement as set out in the

A supplemental agreement which was styled as the variation agreement had lapsed on 23 September 1997 (see cl 2 to the supplementary agreement in exh P12 of p 134 of the bundle of documents) but, without prejudice to the claim against the defendant for the antecedent breaches. On 12 August 1997, James Foong J had also ordered and adjudged that an inquiry be made in respect of the damages suffered by the plaintiff as a result of the B defendant not specifically performing the variation agreement and his Lordship too ordered that damages for breach of the variation agreement be paid by the defendant to the plaintiff in addition to specific performance. This was done by the learned SAR and it was from her decision that the matter now came before me by way of an appeal to the judge in chambers C in encl 75.

The assessment of damages by the learned SAR

Before the learned SAR, the plaintiff called three witnesses, namely:

(1) Mr Ooi Yew Hock (PW1) — an expert property valuer;

D (2) Mr Michael Lau (PW2) — an expert quantity surveyor; and

(3) Datuk David Chua (PW3) — a witness of fact and an expert in his own right.

The defendant, on the other hand, preferred not to call any witness. That E was entirely the prerogative of the defendant. It was submitted that the defendant's representatives were present in court but the defendant refused to call them. In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, Peh Swee Chin FCJ writing a separate judgment for the then Supreme Court had this to say in regard to the choice that the defendants in that case F took (see p 705 of the report):

> The defendants had however chosen to close the case at the end of the plaintiffs' case; they were entitled to do so though they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn against them for failing to call any such evidence should the circumstances appropriately call for such an adverse inference or for the G presumption of avoiding unfavourable evidence by the defence to be invoked against the defendants.

Gopal Sri Ram JCA also writing a separate judgment and who was empanelled to sit in the then Supreme Court aptly said at p 712 of the report:

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> At the trial, the only witness called by the appellants upon the question of fault was the investigating officer who, inter alia, explained the sketch plan of the scene of the accident, which he had prepared. At the close of the appellant's case, counsel for the respondents informed the court that the first respondent was not available to give evidence because he was out of the country. He then made a statement to the effect that he was closing his case.

I

> The record provided to this court does not reflect that the learned sessions judge, who has much experience in such matters, formally put counsel to his election that he would stand on his submissions. This is

unfortunate because the procedure adopted does not appear to meet the requirements of adjectival law.

The first respondent being away from the country and therefore being unable to testify was a fact. It had, in the absence of an agreement between counsel, to be established like any other fact by calling evidence. Once established, certain consequences would ensue in respect of the admissibility of the statements by him to the police officer who reduced them into writing in the form of a police report. It was only after evidence was led tending to prove the first appellant's absence as a fact, or an agreement as to that fact having been secured from his opponent, that counsel would have been entitled to inform the court that he was not calling any evidence. Once he had done this, it was incumbent for the learned sessions judge to have put counsel to his election, namely, that if he did not call evidence, he would stand or fall on his submissions. The rule of procedure, which requires these steps to be followed, is not a mere formality but one of essential justice. For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

In this context, it is sufficient to refer to the following passage in the judgment of Elphinstone CJ in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. *At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.*' (Emphasis added).

And using the speech of Gopal Sri Ram JCA in that case, it was argued that all the evidence led by the plaintiff before the learned SAR was not only true but must be assumed to be true. It was emphasized, again and again, that the evidence of the plaintiff through the three witnesses were unchallenged.

I will now proceed to narrate the evidence called for by the plaintiff. I will refer to the evidence of Datuk David Chua that was led before the learned SAR.

Datuk David Chua described himself as a property developer and as the executive director of the plaintiff, the plaintiff's sister company and the plaintiff's group of companies. He too testified that he had been involved in and undertook various development projects. He said that prior to his current undertakings, he was the manager and, subsequently, the executive director of two major public companies in property development. His curriculum vitae was marked as exh P5 and he testified that he had 27 years experience in the property development industry and that he is extremely knowledgeable in the industry. He too said that he is familiar with the procedures and requirements pertaining to the property development in Kuala Lumpur especially the requirements and procedures of the local authority known as DBKL. Thus far, all these pieces of evidence were unchallenged and so it was submitted that the said Datuk is an expert in the field of property development. The curriculum vitae of Datuk David Chua in exh P5 was worded in this way:

A

CURRICULUM VITAE

Name:	Datuk David KT Chua
Age:	52
Education:	BA Hons University Malaya
Honours & Awards:	PJN, JMN, KMN
Business Address:	DC & A Group Sdn Bhd #29-03, Menara Keck Seng 203, Jalan Bukit Bintang 55100 Kuala Lumpur Tel: 03-9252598 Fax: 03-2456689

B

C

D

Career:

Datuk David Chua has been involved in housing and property development for nearly 30 years. He is the Managing Director of DC & A Group of Companies which has interests in residential, commercial, industrial and resort development projects.

E

Prior to establishing his own property development business he had served as a manager of a leading public listed company in property development in 1973-1978, and later as executive director of another large property development group from 1978-1988.

F

During his career to date, he has been involved in the planning and implementation of many multimillion projects which are important landmarks in Kuala Lumpur today.

G

Besides his career in the housing and property sector, he has also played an active role in the affairs of the housing, commerce and industry and participated in various social economic forums.

Among the positions he has held in the past are:

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- Secretary-General and later Deputy President of the Housing Developers Association of Malaysia (HDA).
- Secretary-General of the Asean Association for Planning & Housing (AAPH).
- Member of the National Consultative Council for Housing (NCCH).

I

- Member of the Advisory Board, City Hall Kuala Lumpur.

- Member of the National Economic Consultative Council (NECC).

Presently he is serving the following honorary positions:

- Deputy Chairman, National Economic Consultative Council II since August 1999.
- Deputy Secretary-General, Associated Chinese Chamber of Commerce and Industry of Malaysia (ACCCIM).
- Panel Member of the Abandoned Housing Project Fund (TPPT), Bank Negara Malaysia.
- Council Member of the National Chamber of Commerce & Industry, Malaysia (NCCIM).
- Co-Chairman, Council for the Promotion of Genuine Joint Ventures (MGUT).
- Member, State Economic Action Council, Selangor (MTES).
- Board Member, Federal Territory Excise Duty Licensing Board.

Can Datuk David Chua be called an expert in his own field? In *Folkes v Chadd* (1782) 3 Doug KB 157, Mr Smeaton, the well known engineer, was allowed to testify concerning his opinion whether an embankment had caused the silting of a harbour. In *Beckwith v Sydebotham* (1807) 1 Camp 116, Lord Ellenborough allowed shipwrights to testify concerning the seaworthiness of a ship. His Lordship was of the view that where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it in the course of their professions or pursuits. Lord President Cooper in *Davie v Edinburgh Magistrates* (1953) SC 34 at p 40 succinctly stated the functions of expert witnesses in these words:

> Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

In *R v Silverlock* [1894] 2 QB 766, the Court for Crown Cases Reserved considered that a solicitor might be treated as an expert in handwriting even if he had acquired his knowledge as an amateur. Specialization is purely a matter of degree. Thus, a stenographer who has familiarized herself with the contents of a tape recording may be treated as a temporary expert (*Hopes and Lavery v HM Advocate* (1960) JC 104). A police officer's experience in investigating traffic accidents may make him an expert for the purpose of reconstructing a particular motor accident (*R v Oakley* (1979) RTR 417;

A and *R v Murphy* [1980] QB 434, [1980] 2 All ER 325), and likewise, that police officer may even testify as to the normal dosage of a drug addict (*White v HM Advocate* (1986) SCCR 274). The phrase 'science or art' that appears in s 45 of the Evidence Act 1950 has been interpreted by His Royal Highness Raja Azlan Shah J (as His Majesty then was) in *Chandrasekaran v Public Prosecutor* [1971] 1 MLJ 153, at p 159 in this way:

B

> The expression 'science or art' is elastic enough to be given a liberal interpretation. If the *Hanumanth* (*Hanumanth v State of Madhya Pradesh* AIR 1952 SC 343) decision was based on the premise that typewriting was not specifically mentioned in s 45, then equally there is no mention of handwriting or foot-print or telephony and yet the evidence of handwriting, foot-print or
> C telephonic experts has been held admissible. So also of ballistic or medical experts who too have not been mentioned in s 45.

It is up to me to decide the competency of an expert (*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, at p 278 (FC)). It goes without saying that an expert must be skilled in his field. That expert may
D acquire that skill through experience (*Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320, at p 322 (FC)). Even a semi-skilled or a semi-professional person may qualify as expert witnesses (*Kong Nen Siew v Lim Siew Hong* [1971] 1 MLJ 262, at p 264). Now, applying the speech of Raja Azlan Shah J (as His Majesty then was) in *Chandrasekaran v Public Prosecutor*, I can safely conclude that Datuk David Chua is an expert in his own field.

E

The learned SAR recorded the evidence of Datuk David Chua dutifully and this can be seen in the court file. As a factual witness, the said Datuk testified that his functions in the plaintiff's company included overseeing projects which included application for approval and the subsequent implementation of the project in which the plaintiff and the defendant were
F involved. According to the said Datuk, Lot 4451 belonged to the defendant and he then produced the title to the said Lot which was then marked as exh P6. The said Datuk also testified that Lot 446 belonged to the plaintiff's sister company — DLC Properties Sdn Bhd; while the remaining parcels of lands for the project belonged to DBKL. The said Datuk alluded to the fact
G that he is also the director of DLC Properties Sdn Bhd. The said Datuk then tendered the project agreement as exhs P8 (at pp 7–13 of the bundle of documents), P9 (at pp 14–15 of the bundle of documents), P10 (at p 16 of the bundle of documents), and P11 (at pp 17–19 of the bundle of documents) which were executed by both the parties and he too confirmed the signatures found in exhs P8, P9 and P10 to be his and that of Chan Kok
H Tong — another director of the plaintiff's company. The said Datuk also tendered the supplementary agreement as seen in exh P12 at pp 132–141 of the bundle of documents and he too confirmed that the signatures therein were his and that of Chan Kok Tong. Flowing from that it was submitted that the agreement between the plaintiff and the defendant as set out in the project agreement was varied by the variation agreement. And that pursuant
I to the project agreement as varied by the variation, it was submitted that the defendant had requested the plaintiff and the plaintiff had agreed to develop the defendant's land as per Lot 4451 together with the adjoining lands into

a comprehensive development including a multi-storey market, car park and shop offices.

Datuk David Chua further testified before the learned SAR that the purpose of the agreement was to create a more efficient layout and a comprehensive development undertaken in accordance with the concept as seen in the layout plan which was annexed to the agreement (see p 141 of the bundle of documents). In these agreements, the plaintiff's role was said to be along these lines: to obtain approval from DBKL for the comprehensive development and to obtain sub-division in accordance with the agreed layout and in the process thereto to regularize the land titles so that the category of land use and the express conditions were in conformity with the National Land Code 1965 so that the defendant would receive the sub-divided titles for all the lots that were developed.

There was evidence that:

(a) the plaintiff would receive ownership of 11 approved developable/buildable lots on the land belonging to DBKL in the sense that ownership of these 11 lots would be transferred to the plaintiff with approval for development and that the plaintiff was to build 11 units of four-storey shop offices on these plots as approved by DBKL (see the portions marked as 'X' in exh P25); and

(b) the plaintiff would also receive ownership of the approved developable/buildable part of DBKL's land where a 17-storey office and shopping complex could be built thereon and that the plaintiff was to build the 17-storey office and shopping complex on this plot. Whereas the remaining part of the land where the 17-storey office and shopping complex would be built belonged to the plaintiff's sister company — DLC Properties Sdn Bhd.

It was argued that had the defendant complied with its end of the bargain by complying with the variation agreement after it came into existence, the comprehensive project contemplated by the parties as set out and identified in the agreements and as reflected in exh P25 would have been completed and the parties would have received their respective entitlements. It was pointed out that the final picture of the entire development would be as described in the artist impression as seen in exh P13B of p 30B of the bundle of documents. It was said that the plaintiff's diligence in undertaking its obligations under the project agreement and the variation agreement were further confirmed by the substantial expenses incurred by the plaintiff which clearly proved the extent that the plaintiff had proceeded in fulfilling its obligations in undertaking the comprehensive project which would have been completed but for the defendant's breach. The expenses incurred by the plaintiff came up to the sum of RM500,665.03 and these sums can readily be seen in exhs P20A to P20B and in exhs P30A to P30R. I do not propose to reproduce these exhibits in this judgment as they are far too long and would take up a lot of space. Suffice for me to say that these exhibits were thought provoking and serve as useful barometers to gauge the damages for and on behalf of the plaintiff.

How to quantify the damages?

The damages suffered by the plaintiff as a result of the failure on the part of the defendant in not specifically performing the project agreement and for breach of the variation agreement as adjudged by James Foong J were in relation to the loss of the plaintiff's entitlements as alluded to somewhere in this judgment. In summary, the entitlements of the parties would be in these directions:

(i) That the plaintiff would have become the registered owner of 11 units of four-storey shop offices built on that part now known as DBKL's land marked as 'X' in exh P25 and that part of the land now belonging to DBKL which formed part of the site for the 17-storey building together with the duly completed 17-storey building.

(ii) That the defendant would have become the registered owner of three developable/buildable lots currently on DBKL's land which was marked as 'Y' in exh P25. The defendant too would also have seven complete and six partial developable/buildable lots on the defendant's own land marked as 'Z' in exh P25.

There was evidence emanating from the plaintiff that the damages comprised the loss of profits that would have accrued to the plaintiff if not for the defendant's conduct and breach. It was emphasized that in quantifying the plaintiff's losses, the plaintiff had only assessed its losses arising from its own entitlement — restricting to those portions that currently belong to DBKL and which would be transferred to the plaintiff but for the defendant's breach. It must be borne in mind that the plaintiff did not make any claim for that part that belongs to the plaintiff's sister company — DLC Properties Sdn Bhd, nor for the market development which would have benefited DBKL.

It was submitted that after the plaintiff had obtained judgment, the plaintiff quickly proceeded to instruct expert valuers to determine the extent of the plaintiff's losses and damages as a result of the defendant's breach. The plaintiff's expert valuer by the name of Mr Ooi Yew Hock (PW1) from Messrs Jones Lang Wooton prepared a report as seen in exh P2 and there he quantified the plaintiff's losses at RM10,500,000 and it was this sum that the learned SAR ordered the defendant to pay.

Before the learned SAR, Datuk David Chua testified that all the units of the development project benefiting the plaintiff would have been sold. He based this conclusion on the following set of facts: that there were a number of established premises operating in less desirable premises who were contemplating to relocate. Banks, Magnum outlets and fast food outlets were all contemplating to relocate. The said Datuk alluded to the fact that he was constantly approached by senior executives of these established premises of their desire to relocate even during bad times. The said Datuk also testified that these properties commanded high premiums because of its location in an established commercial area. But the said Datuk added a caveat to the effect that no bookings were taken from prospective purchasers as it would not have been prudent to do so without resolving the

impediments caused by the defendant. The said Datuk also testified that surveys were done by the plaintiff's marketing department and that he himself had been actively involved in that exercise. It was said that the views of the said Datuk were quite reliable because the Kuan Choo Business Centre in the same locality was completely sold and that it was almost completely sold even at its initial stages of completion. It was the evidence of the said Datuk that almost all the units would have been completely sold and that full sales would have been achieved within the first two months of its launch by virtue of the fact that along Jalan Kelang Lama, newly constructed shops were fully occupied and, even during the economic downturn, it was said that there was hardly any vacancy. When questioned further, the said Datuk stood his ground and he said that there may have been some odd units that may not have been sold immediately after its launch but he ventured further to say that 100% of the units would be sold within a span of two months.

It was submitted that the plaintiff's claim was reflected in the valuation that was placed by Mr Ooi Yew Hock (PWI) in his report as per exh P2 which clearly showed that the part that was valued as highlighted in Appendix 'E' encompassed the 11 units of four-storey offices and a part of the 17-storey building. These were said to be the damages sustained and suffered by the plaintiff. The plaintiff did not make any claim in regard to Lot 446 nor did the plaintiff make any claim in regard to the market development benefiting DBKL. The said Datuk categorically confirmed that the net loss to the plaintiff came up to RM10.5m and that this figure was reached after taking into account all the incurring expenses and the expenses which would have been incurred including those expenses as set out in exhs P20 and P30 respectively.

I will now allude to the evidence of Mr Ooi Yew Hock (PW1) that was recorded by the learned SAR. Mr Ooi Yew Hock testified for the plaintiff as an expert witness. His expertise was in the field of valuing real estate property. As a registered valuer with the board of estate for appraisal since 1986, Mr Ooi Yew Hock was and is authorized to practice his trade as a private valuer. His curriculum vitae was marked as exh P1 and it was worded in this way:

QUALIFICATIONS

- Bachelor of Science (Estate Management) National University of Singapore

CURRENT POSITION

- Executive Director, Jones Lang Wootton, Malaysia

KEY SKILLS AND EXPERIENCE

Eric Ooi has over 17 years experience in real estate professional services and property valuations.

PROFESSIONAL AFFILIATIONS AND APPOINTMENTS

- Fellow of the Institution of Surveyors Malaysia
- Registered Valuer and Estate Agent with the Board of Valuers, Appraisers and Estate Agents, Malaysia

RELEVANT COMPETENCIES

- Property valuation
- Property management
- Property development processes
- Agency
- Development financial analysis
- Property consultancy

He is head of JLW Malaysia's Valuation Department team, which is based in offices located in Kuala Lumpur, Penang and Johor Bahru. His expertise includes the valuation of a wide spectrum of properties, in particular, mega commercial and township projects, plantations, hotels, retail and office complexes, industrial premises and resort properties.

He is responsible for the overall performance of the Kuala Lumpur office's valuation department, maintenance and continuous development of valuation standards.

RELEVANT EXPERIENCE

- Mines Resort City
- Federal Administrative Centre of Putrajaya
- F & N Properties portfolio
- UMW Toyota portfolio
- Kuala Lumpur City Centre
- Kuala Lumpur City Sentral
- Sabah Forest Industries
- Sime Darby Group portfolio

He also has good experience of working in two property based public listed companies where he was involved in project and property management. The portfolio then included three high rise office buildings, two light industrial complexes, two condominiums and a hotel project.

(1) Chairman
Property Consultancy & Valuation Surveying Division, Institute of Surveyors Malaysia.

(2) Member, Malaysian Valuation Standards Committee.

(3) Examiner, Test of Professional Competence Board of Valuers, Appraisers & Estate Agents, Malaysia.

Examiner, Institute of Surveyors Malaysia Professional Exams.

His experience span for a period of more than 15 years and he used to give evidence in a court of law. He is certainly not a novice. He explained that valuation involved the skill of attaching values to real estate be it in relation to a building which was proposed to be built in the near future or even in regard to the retrospective valuation of a building that has already been constructed. He was quite categorical when he said that his expertise involved determining profit, loss and costs of the development. He confirmed that his report in exh P2 is true and accurate and he adopted the

contents of his report for the purpose of the present proceedings. He then proceeded to testify before the learned SAR in regard to the profits which the plaintiff would have made on the 11 units of four-storey terrace shop offices and a part of the 17-storey commercial building and that the valuation was at mid-1997 which incidentally coincided with the time wherein the judgment of James Foong J was delivered and it also coincided with the time wherein the plaintiff's buildings would have been sold, but for the defendant's breach. He then proceeded at length to repeat and explain his report as per exh P2 and he too said that he relied on the expertise of the quantity surveyor in the person of Mr Michael Lau (PW2) in order to determine the costs of building the 11 units of four-storey office building which was computed at RM4,754,000 as seen in Appendix J of exh P2. He testified further that it was within his line of expertise to quantify the costs of building that building and he did just that. He explained in some detail as to how the profits were determined and these details can be seen in Appendix K of exh P2. Concisely put, he explained the mechanism of computing the profits. He said that after deducting all the costs and expenses, the profits which the plaintiff would have made for the 11 units of four-storey office building would be RM3.8m and the profits for the 17-storey retail and office building — on DBKL's land only and excluding the part on the plaintiff's sister company's land at Lot 446 — would be RM6.7m. The sum total of it all would be RM10.5m and that, according to him, constituted the total loss of profits which accrued to the plaintiff. Before the learned SAR, the evidence of Mr Ooi Yew Hock was not discredited. The defendant did not call any expert evidence to counter the evidence of Mr Ooi Yew Hock.

Mr Michael Lau (PW2) testified for the plaintiff before the learned SAR. He is described as a quantity surveyor attached to the Juru Ukur Bahan Consult and his curriculum vitae can be seen in exh P3 which clearly sets out his field of expertise. He elaborated on his qualification and he explained that he is currently a member of the Juru Ukur Board as well as the Institute of Malaysia. He emphasized that he has been a professional quantity surveyor since 1987 and that he has been a partner in Juru Ukur Bahan Consult since 1985. He testified as to the list of clients which his firm had serviced (see exh P3) and the projects which his firm had undertaken (see exh P3). Of particular importance was his testimony that he was personally involved in all these professional works which included projects involving commercial development, civil structural works, industrial development, residential development and, last but by no means least, resort and hotel developments. He then proceeded to produce the Borang K (see exh P3) which, in essence, is the licence issued to his firm. He also testified, in no uncertain term, that his firm is qualified to handle government projects. He then explained that he used to testify in court as an expert witness and that he too had testified as an expert in arbitration cases. He confirmed that Appendix J as seen in exh P2 is a copy of his expert report in regard to his estimate of the costs of building the 11 units of four-storey offices which was identified by an alphabet 'X' found on the layout plan as seen in exh P25. His report dated 12 June 1998 was then

tendered and marked as exh P4. It must be borne in mind that the expertise of Mr Michael Lau went unchallenged.

The sealed copy of the order of James Foong J, dated 12 August 1997, sets out prayers 2(c) and 2(e) and they should now be reproduced:

> 2(c) bahawa penyiasatan dibuat berkenaan kerugian yang dialami oleh plaintif yang disebabkan oleh defendan tidak melaksanakan secara spesifik perjanjian tersebut.
>
> (e) bahawa gantirugi untuk pemungkiran 'Perjanjian Supplemental' dibayar oleh defendan kepada plaintif disamping pelaksanaan spesifik.

And it was submitted on behalf of the defendant that prayer (c) as reproduced above merely states that an inquiry be made into damages caused by the defendant for not having specifically performed the supplemental agreement. Whereas by prayer (e) as reproduced above, the plaintiff was said to seek 'two bites at a cherry' by claiming for damages arising out of a breach of the so-called 'variation agreement' together with the specific performance of the provisions of the supplemental agreement. As alluded to earlier the inquiry was held before the learned SAR and she assessed damages at RM10.5m as prayed for by the plaintiff as loss of profits to the plaintiff in not being able to construct and sell the 17-storey commercial block and the four-storey shop-houses and offices.

Mr Balan S Nair, the learned counsel for the defendant, argued that what James Foong J ordered on 12 August 1997 was wrong as it ran counter to the decision of the Court of Appeal (with the coram of Shaik Daud, Siti Norma Yaakub and Abdul Malek Ahmad JJCA) in the case of *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310. There Shaik Daud JCA speaking for the Court of Appeal said at p 313 of the report:

> The essence of the respondent's claim in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regarded as an alternative claim. They cannot get both remedies. If they claim for *specific performance*, they are treating the agreement as still subsisting and wants the other party to perform it. If their claim is for *damages for breach*, they are treating the agreement as having come to an end and therefore incapable of being performed. As stated earlier the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach. They therefore ought to *amend* their pleadings and without doing so, the learned judge ought not to have ordered damages to be awarded to them. The respondent cannot be allowed to change the *whole nature of their claim* which essentially is a claim for specific performance, by turning it into an ordinary action for damages. (See *Hipgrave v Case* (1885) 28 Ch D 356).

At the High Court level, I had decided the case of *Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd* [1995] MLJU 489 where the plaintiffs there had sought for six prayers in the minutes attached to the summons and the plaintiffs had decided to abandon the prayer for specific performance of the agreement after the defendant had reimbursed RM136,000 and the defendants then proceeded to focus their attention to the damages for

breach of contract to be assessed by the senior assistant registrar under O 37 of the Rules of the High Court 1980 ('the RHC'). A

In a sequel, I also heard the same case after the Court of Appeal had set aside my order and the Federal Court had concurred and affirmed the decision of the Court of Appeal. That case which I had heard had since been reported and I will now cite that case. It was *Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd (No 2)* [2000] MLJU 232 and the facts may be stated as follows. There the plaintiffs had commenced an action against the defendants for specific performance of an agreement made between the same parties and in the alternative, for damages for breach of contract. The defendants then handed a cheque of RM136,000 to the plaintiffs as full settlement of the whole case. However, at the hearing, the plaintiffs informed the court that they were abandoning the claim for specific performance but was proceeding for damages to be assessed by the SAR in lieu thereof. I had acceded to the request of the plaintiffs and ordered that damages be assessed accordingly. The defendants then appealed to the Court of Appeal and the Court of Appeal then set aside the order which I had made. The Federal Court, too, concurred and affirmed the decision of the Court of Appeal. Unfortunately, the Federal Court did not write their judgment. But both the superior courts did not strike out the civil action between the parties thereto. So the plaintiffs proceeded to prosecute the said action and applied for leave to amend under O 20 r 5 of the RHC. The defendants then applied to strike out the said action and this was granted by the SAR. The plaintiffs then appealed against the decision of the SAR and I accordingly heard it. I then made the following rulings: B C D E

(1) that the civil suit between the parties still persisted and was in existence. That the plaintiffs had every right to pursue the matter right to the very end and it was not an abuse of the process of the court for the plaintiffs to proceed with the claim; F

(2) that the civil suit should proceed for trial so that the court would be able to determine whether: (a) the payment of RM136,000 by the defendants to the plaintiffs amounted to full and final settlement; and (b) if the answer was in the negative, whether the plaintiff's claim for damages was limited to RM136,000 on the assumption that the plaintiffs had established a breach of contract by the defendants; G

(3) that s 74(1) of the Contracts Act 1950 gives the power to the court to order damages for breach of contract. And that s 18(2) of the Specific Relief Act 1950 enacts that the court upon an application by any person for specific performance, may, if it decides that specific performance ought not to be granted, grant compensation; H

(4) that if a party claims for specific performance and abandons it at the trial, the court cannot award damages at common law without sufficient amendment; and

(5) that the question of granting relief by way of damages in lieu of or in substitution of specific performance is a matter resting entirely with the court and the parties have nothing to do with it. The plaintiffs cannot be allowed to abandon the case for specific performance and I

yet claim damages in lieu thereof. If the plaintiffs choose to abandon their claim for specific performance and pursue their claim for damages, the plaintiffs must do so before the trial begins. In the present appeal, the trial had not proceeded and the plaintiffs applied to amend the writ and the statement of claim in order to comply with the decision of the Court of Appeal.

I am given to understand that there was no appeal lodged against my decision, namely, *Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd (No 2)*.

Now, to say as was said by Mr Balan S Nair that the decision of James Foong J dated 12 August 1997 was wrong (when his Lordship had ordered specific performance with damages to be paid by the defendant in the present appeal to the plaintiff in the present appeal) must be viewed in the context of s 74(1) of the Contracts Act 1950 which gives the power to the court to order damages for breach of contract and that section enacts as follows:

> Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Of pertinence too would be s 18(2) of the Specific Relief Act 1950 which must be taken into account. That section enacts that the court upon an application by any person for specific performance may, if it decides that specific performance ought not to be granted, grant compensation.

In the statement of claim dated 18 December 1996 which can be seen in the 'Ikatan Dokumen Plaintif Jilid 1', the present plaintiff sought for the following prayers:

(1) an order that the defendant do duly execute the said 'supplemental agreement';

(2) specific performance of the terms and conditions of the variation agreement as set out in the said 'supplemental agreement';

(3) all necessary and consequential orders;

(4) damages for the breach of the variation agreement as set out in the 'supplemental agreement' in lieu of or in addition to specific performance;

(5) interest on all damages awarded at the rate of 8% pa from the date hereof to the date of full settlement;

(6) costs; and

(7) such further or other relief as this honourable court deems fit and just to grant.

As can be seen, the prayers sought for were not only for specific performance but also for damages. This would certainly be in accord with the decision of the Court of Appeal in *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd*.

By way of a reiteration, James Foong J had found that the defendant had breached the variation agreement and awarded, inter alia, damages to be assessed. The learned SAR assessed the damages and awarded RM10.5m in favour of the plaintiff. In my considered view, the measure of damages due to the plaintiff was governed by s 74 of the Contracts Act 1950. This very section was considered by the then Federal Court in the case of *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171 and Ali FJ speaking for the then Federal Court had this to say (see p 172 of the report):

> The measure of damage recoverable involves the consideration of section 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of common law laid down in *Hadley v Baxendale* (1854) 9 Exch 341 which was in two parts, namely: (1) damage arising naturally, ie according to the usual course of things from the breach; and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

From the evidence adduced before the learned SAR it was quite obvious that the damages suffered by the plaintiff in the present case were damages that arose naturally in accordance 'to the usual course of things from the breach'. Translated into simple words, it meant this: if the defendant had duly executed the supplementary agreement and carried out its obligations to the letter, the plaintiff would have proceeded to obtain the relevant plots of lands and would have built on the same plot in order to reap the profits. Unfortunately, the defendant's breach had put an end to all this. To take the extreme case, even if it was argued that the damage suffered by the plaintiff was not the natural consequence, yet it can never be doubted that the parties knew or may reasonably be supposed to have been in their contemplation at the time the agreements were made as to the probable result of the breach. Again, on the rigours of s 74 of the Contracts Act 1950 reference should be made to the case of *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39, a decision of the then Federal Court. At p 40 of the report, Ong Hock Thye FJ had this to say:

> Section 74(1) of the Contracts (Malay States) Ordinance 1950 is the statutory enunciation of the rule in *Hadley v Baxendale* (1854), 9 Exch 341. This section reads:
>
> > 'When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.'
>
> The rule lays down the main principles as follows:
>
> > 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539 in a passage which I shall quote in full:

> '(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v Chicoutimi Pulp Co* [1911] AC 301). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
>
> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.
>
> (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196).
>
> (6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could forsee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at p 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.'

That was certainly thought provoking. The damages payable by the defendant to the plaintiff were confined to the loss of the 11 units of four-storey offices and a part of the 17-storey shopping and office building and this was valued by Mr Ooi Yew Hock (PW1) at RM10.5m and whose evidence went unchallenged. The time of assessment would be computed

at the date of the judgment which would also have been the estimated time of the sale of the plaintiff's buildings if everything had gone on smoothly. The 'modern approach' in determining the relevant date for the assessment of damages would be at the date of the judgment and not at the date of the breach (*Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 at p 679; and *Ong Seok Heng v Wee Cheong Motor & Housing Developer Sdn Bhd* [1990] 2 CLJ 1007).

It must be emphasized that the defendant had never led any evidence before the learned SAR and so it was part and parcel of my judgment that the testimonies of the plaintiff's three witnesses must be accepted (*Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor*).

Before the learned SAR, the learned counsel for the defendant had 'attempted' to impeach the veracity of the plaintiff's witnesses during cross examination — in particular Mr Michael Lau (PW2) and Datuk David Chua (PW3) but these witnesses' testimonies remained unruffled. It is pertinent to note that the cross-examination was flawed because no challenge was ever put to the plaintiff's witnesses. In *Powell's Principles and Practice of the Law of Evidence* (10th Ed) by William Blake Odgers and Walter Blake Odgers, there is a write-up that needs reproduction and it is found at p 469 thereto. There the following passage appears:

> The general rule as to impeaching the veracity of one's opponent's witnesses was thus stated by Lord Herschell in the case of *Browne v Dunn* 6 The Reports, 67:
>
> > 'I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.'

Browne v Dunn (1893) 6 R 67 is now accepted as expounding the correct law. It sets out the general rule to impeach the veracity of one's opponent's witness.

It was submitted, as alluded to earlier by me, that the plaintiff was seeking 'two bites at a cherry' by claiming for damages and specific performance. These submissions were certainly misconceived. At my level, I was not concerned with submissions of this kind. It would be entirely within the domain of the Court of Appeal to consider bearing in mind that there was an appeal against the decision of James Foong J. In encl 75, my

A concern was not in regard to liability but rather confined to damages. It was therefore on this point that the present appeal in encl 75 can be distinguished from the case of *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* — a decision of the Court of Appeal.

I will now refer to the celebrated case of *Tan Sri Khoo Teck Puat & Anor* B *v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, a decision of the Federal Court. An examination of *Tan Sri Khoo*'s case would show why the Federal Court had reversed the High Court's award for damages to a nominal RM10.00. The Federal Court was of the view that the High Court was wrong in deciding the way it did in *Tan Sri Khoo*'s case. Here, in the context of adjudicating encl 75, the plaintiff's claim was not contrary to the C principles as set out in *Tan Sri Khoo*'s case. The High Court in *Tan Sri Khoo*'s case was clearly wrong when it awarded loss of profits over and above the expenses incurred. Whereas in the present appeal, the sum of RM10.5m as claimed was computed after having set-off all the expenses which have been and which would have been incurred. Again in *Tan Sri Khoo*'s case, the award of the High Court had put the plaintiff there in a better position D than it would have been had the contract been performed and the plaintiff there, in fact, had failed to prove its claim for loss of profits. Here, the position was different. A reading of *Tan Sri Khoo*'s case would show the following salient points as alluded to by Edgar Joseph Jr FCJ, a brilliant judge of his time:

E (a) At p 784 at para B of the report, it was held that it is common that compensation may be awarded in addition to specific performance.

(b) At p 784 at para E of the report, it was held, inter alia, that damages was for wrongful termination. Here, damages were awarded not for wrongful termination but rather for breach of the variation contract. F James Foong J in the present case had found that the defendant had breached the variation agreement and his Lordship then ordered that damages be assessed.

(c) At p 784 at para F, it was held that the fundamental requirement was not proved. Whereas here in the present appeal, the plaintiff had adduced evidence through factual and expert witnesses before the G learned SAR to support the damages which it claimed but the defendant had chosen not to lead any evidence.

(d) At p 784 at para B, it was held that the defendant had purported to terminate the agreement even though it was not entitled to do so. Here, in the present case, there was no purported termination and the H defendant here simply refused to carry out its obligations under the variation agreement. Here there was a delay of one year eight months and the defendant failed to appreciate that this had caused the loss to the plaintiff. Here, the variation agreement was to terminate by effluxion of time on 23 September 1997. Here too after specific performance was ordered on 12 August 1997, the defendant still failed I to provide the necessary irrevocable undertaking.

(e) The loss in *Tan Sri Khoo*'s case was merely the loss to the plaintiff in the form of a five-year delay in receiving the land titles and later the

plaintiff finally received what it had contractually bargained for. Here, the defendant not only refused to execute the supplementary agreement for more than one year and eight months as agreed in the variation agreement but the defendant also refused to carry out its obligations under the variation agreement by refusing to provide the irrevocable undertaking from the bank. Then the variation agreement came to an end on 23 September 1997 and the plaintiff here never received what it had bargained for and therefore the plaintiff had suffered substantial losses as proved at the hearing before the learned SAR.

(f) The plaintiff in *Tan Sri Khoo*'s case received what it had bargained for even though it was delayed by five years. Here, the plaintiff did not obtain what it had bargained for at all.

(g) In *Tan Sri Khoo*'s case, there were expert witnesses tendered by both parties and the High Court had to decide based entirely on the contradicting expert evidence. Here, in the present appeal, there was no expert evidence led by the defendant. In fact, the defendant here did not lead any evidence. Whereas the plaintiff here called three witnesses before the learned SAR.

(h) In *Tan Sri Khoo*'s case, the High Court had adopted the wrong approach in awarding damages by striking out a compromise between the conflicting expert evidence (see p 790 at paras H–I of the report). In reality, the High Court in *Tan Sri Khoo*'s case should have adopted the evidence of Miss Lim, an accountant in the employment of Messrs Coopers & Lybrand, a well known firm of chartered accountants.

(i) In *Tan Sri Khoo*'s case, the plaintiff there in fact did not suffer any loss as a result of the defendant's breach. In fact, the plaintiff in *Tan Sri Khoo*'s case made a substantial profit as a result of the defendant's breach to the tune of RM70m as a result of the increase to the value of the land (see p 793 at paras E–F and at p 798 at paras F–I). Here, in the present appeal, the plaintiff was not to receive the title or the benefit of the defendant's land. Here, the defendant was to surrender parts of its land to the local authority and in return to receive certain buildable and developable lots on its land and DBKL's land, and the plaintiff would then receive the buildable and developable lots from DBKL on which the plaintiff would have built and sold in order to reap the profits. The facts of the present appeal and that of *Tan Sri Khoo*'s case are totally irreconcilable but the principles of law as enunciated in *Tan Sri Khoo*'s case would still be applicable after a careful consideration.

The salient features of the present appeal may be stated in this fashion:

(1) Here, even though the plaintiff was ready to proceed as early as 23 December 1995, the defendant not only delayed it for one year and eight months but it also failed to carry out its obligations leading to severe losses to the plaintiff. It must be borne in mind that time was

A the essence of the contract. At the end of the day, the plaintiff here never received what it had bargained for.

(2) James Foong J had held that there was a valid contract between the parties and that the defendant had breached the variation agreement.

(3) That even though the defendant here did execute the supplementary B agreement after the order and the judgment of James Foong J, yet this was only done after there was substantial delay which delay had led to losses being sustained by the plaintiff.

(4) That the plaintiff here succeeded in proving before the learned SAR the losses which it had suffered without any material challenge C mounted by the defendant.

Mitigation

In regard to the issue of mitigation, I have this to say. Although it is trite law that an innocent party to a breached contract must mitigate its losses, yet in D the peculiar circumstances of the present appeal, mitigation cannot apply because the project in question was comprehensive in nature. Moreover, the duty to prove mitigation is on the part of the defendant. A perusal of the English case of *Roper & Anor v Johnson* (1872–73) 8 Hilary Term, 36 Vict 167 is certainly apt. There Keating J had this to say at p 178 of E the report:

> It seems to me that, when the plaintiffs have shewn that there has been a distinct breach of the contract on the part of the defendant, and have further shewn that at the periods at which the coal should have been delivered, they could only have obtained them at an advanced price, they were entitled to the difference between that advanced price and the contract price, unless the F defendant gave evidence that another similar contract might have been obtained on more mitigated terms. For instance, if there had been a fall in the market, or any other circumstances calculated to diminish the loss, it would be for the defendant to shew it.

Brett J too had this to say at pp 179–180 of the report:

G

> Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed.

H Continuing at pp 181–182 of the report, Brett J said:

> It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract-price and the market-price at the several days specified for the performance of the contract, and that prima facie that is the proper measure of damages; leaving it to the defendant to shew circumstances which would I entitle him to a mitigation. No such circumstances appeared here: there was nothing to shew that the plaintiffs ought to have or could have gone into the market, — a rising market, — and obtained a similar contract.

Grove J too said at pp 182–183 of the report:

> Was there any evidence upon which the court could rely in support of the proposition that the plaintiffs could at the time of the admitted breach have gone into the market and made a similar contract? I cannot gather from the notes of the learned judge who tried the cause that there was any evidence upon which the jury could have come to such a conclusion.

Continuing at p 184 of the report, Grove J said:

> The plaintiffs having made out a prima facie case of damages, actual and prospective, to a given amount, the defendant should have given evidence to shew and to what extent that claim ought to be mitigated. No such evidence was attempted to be given. It is entirely upon the absence of that evidence that I rest my judgment.

Ian Chin J in *Soosan Trading Co Ltd v Tawau Auto Sdn Bhd* [1997] 4 CLJ Supp 519 vigorously applied the case of *Roper & Anor v Johnson*. In that case, the plaintiff was supplied with the wrong kind of timber — nyatoh, and the plaintiff could have made use and/or sold the said nyatoh to mitigate their loss but the plaintiff did not do so. The learned judge held that it was for the defendant to state exactly how the nyatoh was to be used to mitigate the losses. In the present appeal before me, the defendant had failed before the learned SAR to discharge this duty. Be that as it may, the plaintiff had led unchallenged evidence showing that nothing could be done when the defendant breached the agreements because it involved a comprehensive development. The right of the plaintiff to claim for damages cannot be denied. It also cannot be denied that the plaintiff here cannot be forced to take any other course except to proceed to secure damages. In *Strutt v Whitnell & Anor* [1975] 1 WLR 870, Cairns LJ rejected the argument by counsel and held that the plaintiff there had a right to substantial damages even if it could have accepted the defendant's offer and reduce damages. In style, this was what Cairns LJ said at p 873 of the report:

> The circumstances here were that the only remedy in law which the plaintiff initially had for the breach of contract was a right of action in damages. If it be said that an alternative remedy was offered to him by the defendants of selling the house back to them I would say that the plaintiff was not bound to choose between the two remedies. It seems to me that if Mr Scrivener's contentions were right it would logically follow that if the offer that had been made by the defendants had been not 'We will take the house back' but 'We will pay you 1,900 pounds damages' and the plaintiff had then, for some reason, refused that offer and had brought an action for damages it could be said that he ought to have accepted the offer and thereby mitigated his damages and therefore he was entitled to nothing at all. That cannot be. Clearly what would happen in those circumstances would be that the defendants, if they were wise, would make a payment into court of the 1,900 pounds and the plaintiff would suffer in respect of costs. But it could not possibly be suggested that the refusal to accept the offer, even if such refusal were wholly capricious, was something that deprived the plaintiff of his right to substantial damages altogether.

It must be borne in mind and I reiterate that the project was a comprehensive one. If the defendant reneged as it did, the project will

A simply collapse. It cannot proceed. The suggestion by the defendant that the plaintiff should have proceeded with the development on DBKL's land and Lot 446 were totally illogical. How could such a development proceed when neither DBKL nor the plaintiff would derive any benefit. At any rate, it was for the defendant to prove and on this score the defendant had failed completely. It would be correct to say that any development on DBKL's B land or on Lot 446 in the near future cannot and will not in any way mitigate the losses already suffered by the plaintiff. It would not be out of place to mention that the plaintiff was not seeking to be put in a better financial position. Rather, the plaintiff was merely seeking to recover its losses as a result of the defendant's breach. It must not be forgotten that the benefit to C the plaintiff was the land and the building on DBKL's land which was now lost. The arguments of the plaintiff were quite simple and straight forward.

It was this. If the defendant did not breach those agreements, the plaintiff would have received RM10.5m in profits. These handsome profits were said to be lost forever because of the defendant's breach. Thus, the plaintiff was seeking RM10.5m because this sum would put the plaintiff in D a position it would have been in if the defendant had not breached. Here it was said that the plaintiff was not desirous of making any claim in order to be put in any better position.

For all these reasons, I, without hesitation, dismissed encl 75 with costs.

I will now proceed to consider the application in encl 77.

E

Enclosure 77

This was an application by the defendant for a stay of execution of the learned SAR's decision dated 10 October 2000 in regard to the damages which she had awarded after inquiry.

F At the outset, a preliminary issue was raised by the plaintiff. It was like this. That the defendant's application in encl 77 was defective in substance because it did not state the period in which the stay was prayed for. For clarity, it would be ideal to reproduce encl 77 and I do so now:

> 1) Penggantungan pelaksanaan terhadap keputusan penolong kanan G pendaftar yang diberikan pada 10 Oktober 2000 di mana defendan dikehendaki membayar jumlah sebanyak RM10,500,000 bersama faedah pada kadar 8% setahun dari tarikh tindakan ini dimulakan sehingga tarikh penyelesaian sepenuhnya dan kos keseluruhan tindakan ini.
>
> 2) Apa-apa perintah dan arahan selanjutnya berkenaan dengan pengendalian tindakan ini sepertimana mahkamah yang mulia ini H menimbangkan berpatutan, adil dan saksama.
>
> 3) Kos permohonan ini dijadikan kos dalam kausa.

which in essence was not happily worded because the period wherein the stay was prayed for was not specified. This preliminary issue was ventilated in the plaintiff's affidavit in encl 79 at para 3. In the defendant's second I affidavit in encl 80 at para 4 by way of a reply it was stated that the period was stipulated in the defendant's first affidavit in encl 76. But it was submitted by the plaintiff that the defendant's first affidavit in encl 76 did

not state nor carry such an averment. It was the stand of the plaintiff that the defendant's application in encl 77 should expressly stipulate the period that was prayed for (*Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan (Leong Yok Chin Intervener)* [1996] 4 CLJ 256, at p 271). By way of a rebuttal it was submitted at the bar on behalf of the defendant that the stay should be granted 'until the final disposal of the defendant's appeal to this honourable court or alternatively until the appeal to the Court of Appeal against the decision of YA James Foong J is disposed of'. But unfortunately, such a statement from the bar, so the submission went, cannot rectify the application in encl 77 nor could it rectify the matter. To confound the matter further, in para 4 of the defendant's second defendant as seen in encl 80, the defendant averred that the stay that was prayed for was until the appeal against the decision of the learned SAR that was given on 10 October 2000 was decided by this honourable court. All these, according to the plaintiff, must necessarily render the application in encl 77 liable to be dismissed with costs.

For my part, although encl 77 wherein the application for the stay was housed in was not happily worded, yet it did convey the message that the stay of execution was applied for. Prayer 2 of encl 77 must be read with the submission that was advanced at the bar by the defendant and when so read the period wherein the stay was prayed for could be determined. At any rate, it was a mere irregularity that was curable (see prayer (2) of encl 77). I refused to entertain the preliminary issue and I then proceeded to hear encl 77 forthwith.

The law on stay — in brief

In essence, by virtue of the doctrine of stare decisis, the courts are bound by the Federal Court decisions of *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 (FC), and *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 (FC), to adopt the 'special circumstances' approach. Thus, with respect, the Court of Appeal's decision in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 (CA), which applied the 'nugatory' approach should be rejected. I had in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1996] 4 MLJ 533, while applying the principle of stare decisis had applied the 'special circumstances' approach. My learned brother Mohd Hishamudin J also adopted a similar view in *Tneoh Hong Seng @ Teoh Hong Seng v Dayani Sdn Bhd* [1998] 2 AMR 1066. Thus, it is now well settled that it is the 'special circumstances' approach that should be adopted and applied.

The onus of proof

It is trite law that the onus is on the defendant to show special circumstances (*Kerajaan Malaysia v Dato' Hj Ghani Gilong*). As to the meaning to be attached to the words 'special circumstances', reference should be made to the case of *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja*

A *Ladang Bhd* [2000] 6 MLJ 493, a decision of Vincent Ng J. There at p 499 of the report, his Lordship lucidly explained the meaning to be attached to the expression 'special circumstances'. This was what his Lordship said:

> Thus, 'special circumstances' does not mean very special or exceptional or peculiar circumstances but is a term to denote a combination of certain
B determining factors that are demonstrated by affidavit evidence to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances. In other words the term 'special circumstances' for purposes of stay proceedings does not bear precisely the same meaning ascribed to it in *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86. In order not to impose a fetter on the exercise of the courts discretion whether to grant
C a stay of execution, myriad and various factors constituting special circumstances have been recognized by the courts in Commonwealth jurisdictions, and 'how pertinent that factor would may vary according to the circumstances of each particular case' per Abdul Hamid J (as he then was) in *Mohd Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126). I would therefore wholly and readily agree with the lucid views — expressed in potent language
D — of Ian HC Chin JC (as he then was) in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514) who had this to say 'I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the
E discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

Further down on the same page and spilling over to p 370 of the report, his Lordship Vincent Ng J had this to say:

F > In *Alexander v Cambridge Credit Corp Ltd* (1985) 10 ACLR 42, although Kirby P, when delivering the judgment of the Court of Appeal of New South Wales, had frowned upon the use of the expression 'special or exceptional circumstances' in preference to 'an appropriate case', he nevertheless quite correctly (in my view) set out the following three essential ingredients (the traditional core ingredients) that are necessary to demonstrate 'an
G appropriate' case to warrant the exercise of discretion in favour of a stay, namely:
>
> (i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *A-G v Emerson & Ors* (1889) 24 QBD 56; *Clyne v Deputy Commissioner of Taxation* (1982) 56 ALJR 857; and such balance of
H convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the court (as per provision '... may order ... on such terms as it thinks fit', in O 45 r 11 of the RHC, and also see *Andrews & Anor v John Fairfax & Sons Ltd* [1979] 2 NSWLR 184);
>
> (ii) where 'it is apparent that unless a stay is granted an appeal will be
I rendered nugatory (see also *Wilson v Church No 2* and *Scarborough v Lew's Junction Stores Pty Ltd*); and
>
> (iii) that the applicant/appellant 'has an arguable' appeal.

Thus, it would be apparent that where the defendant here was only able to satisfy one or even two of the abovementioned ingredients, it will not suffice to constitute special circumstances necessary for a successful stay application.

Were there merits in the defendant's application?

It is the defendant who must demonstrate by affidavit evidence that there were merits in its application in encl 77 by showing special circumstances (*Kerajaan Malaysia v Dato' Hj Ghani Gilong*, and *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd*). On the available affidavit evidence and applying the principles of law as alluded to by me, the defendant had failed to meet any of the ingredients justifying a stay of execution.

I will now refer to the issues that were raised by the defendant in its affidavits, but not in chronological order.

(a) Large sums of damages have been awarded

In *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224, I had occasion to apply *Eng Yam Construction Sdn Bhd v TAP Properties Sdn Bhd* digested in 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1363 and held that the fact that an award of a large sum of money was involved did not constitute special circumstances. In *Wu Shu Chen*, the sum involved was RM25,892,000 and I proceeded to hold that the underlying rationale for the proposition that it did not constitute special circumstances even though a large sum of money was involved was due, in the main, to the fact that the court will not deprive a successful party of the fruits of his litigation until the appeal was determined unless the unsuccessful party could show special circumstances to justify it.

(b) Hardship and inability to further operate its business

Hardship and financial burden as claimed by the defendant fall short of the special circumstances test (*Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan (Leong Yok Chin Intervener)*). At any rate, it is germane to note that the defendant in its application and in its affidavits have only averred that the execution would disrupt its business. But unfortunately, the defendant failed to explain nor adduce affidavit evidence to show as to how exactly the execution would affect its business (*Yun Hing (Sabah) Sdn Bhd v Sandakan Plywood & Veneers Co Sdn Bhd* [1995] 1 MLJ 339).

(c) That the defendant has lodged an appeal against the decision of the learned SAR to me as seen in encl 75

The answer can be found in O 56 r 1(4) of the RHC which states as follows:

> Except so far as the court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

In short, the filing of encl 75 cannot operate as a stay of execution.

(d) That the defendant has lodged an appeal to the Court of Appeal

It is now trite law that an appeal to the Court of Appeal will not operate automatically as a stay of execution (*Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor*; s 73 of the Courts of Judicature Act, 1964; r 13 of the Rules of the Court of Appeal 1994; and *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40).

(e) The defendant's intention to file a notice of motion before the Court of Appeal and the introduction of two letters as 'fresh evidence'

Under this head, the submissions of the learned counsel for the plaintiff proceeded along these lines. That the application for the inclusion of the two letters is evidence pending before the Court of Appeal and so it must be deemed that until such time when the evidence is admitted by the Court of Appeal (which the plaintiff says that it will not be) then there is no such evidence. In any event, the contents of the two letters clearly show that they are totally irrelevant to the appeal to the Court of Appeal. It was submitted that the subject matter before the Court of Appeal is on the issue of the liability of the defendant's breach of the variation agreement. Even if the contents of the two letters were relevant, which is denied, the two letters may have been relevant at the inquiry and during the assessment of the damages that were conducted before the learned SAR on 19 July 2000 and 20 July 2000 respectively — and that would be after the two letters were alleged to have been made available. But the defendant had failed, refused and/or neglected to tender/produce the two letters at the inquiry and during the assessment despite their availability.

Continuing further, this was what the plaintiff said in regard to the two letters:

(1) That the defendant had failed to provide any affidavit evidence as to the relevance of the contents of the two letters as fresh evidence. That the defendant had failed to demonstrate as to how the contents of the two letters, even if they were relevant, would amount to special circumstances justifying a stay of execution.

(2) That the defendant's contention that the appeal was meritorious was nothing more than a mere assertion and this was insufficient to support the application for a stay. That the court, as a rule, would only grant a stay if there were special circumstances which must be deposed in the affidavit supporting the application. A mere bare assertion in the affidavit that the appeal is meritorious is not sufficient and does not suffice (*Kerajaan Malaysia v Dato' Hj Ghani Gilong*; and *Tneoh Hong Seng @ Teoh Hong Seng v Dayani Sdn Bhd*). According to Lord Denning MR in the case of *TC Trustees Ltd & Anor v JS Darwen (Successors) Ltd* [1969] 2 QB 295, at p 302:

> We were referred to a statement in *Halsbury* (3rd Ed) Vol 16 (1956), 'Execution,' p 34. But I think it is too widely stated. The authorities cited do not support it. It is true that the courts have an inherent jurisdiction to stay

proceedings, but only on grounds which are relevant to a stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for those must be raised in the action itself.

(3) In the defendant's first affidavit in encl 76 at para 8 and in the defendant's second affidavit in encl 80 at para 9, the defendant had averred that hopefully the Court of Appeal would accept those two letters based on fairness and equity bearing in mind that those two letters were not in the possession of the defendant when James Foong J adjudicated the matter. It was submitted on behalf of the plaintiff that it was extremely presumptive on the part of the defendant to assume that the Court of Appeal would allow its originating motion to introduce the two letters. It was submitted on behalf of the plaintiff that the two letters have no relevance whatsoever to the issue of whether the variation agreement was breached by the defendant. It was further submitted that the said originating motion was only filed after the plaintiff had raised the fact that the defendant did not take any action for the period of three years.

I would, with respect, agree with the submissions of the learned counsel for the plaintiff.

(f) There is in existence the power of attorney

It was pointed out that this issue was not only irrelevant to the stay application it had also been raised at the inquiry and at the assessment exercise conducted by the learned SAR. For that reason, it was emphasized that this issue should not be raised once again. At any rate, it was pointed out that this issue will not constitute special circumstances because in the words of Lord Esher MR in *Atkins v GW Ry* (1886) 2 TLR 400, 'strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so.' And echoing the words of NH Chan J in *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* at p 43 of the report:

> ... neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the defendant to a stay of execution.

(g) That the plaintiff is poor and there is a risk of dissipation

Of course, it goes without saying that the alleged poverty of the plaintiff itself does not suffice as special circumstances except where it can be shown that there is no reasonable probability of getting the money back if the defendant succeeds on its appeal. Here, the defendant must adduce affidavit evidence to that effect and the defendant had failed to do so (*Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* at p 44 at paras G–I; and *Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391, at p 396 at paras F–G). This was a classic case where the defendant merely made bare assertions and bare allegations. There was no affidavit evidence to show that there is a real risk that the plaintiff will

dissipate the assets. It is not enough for the defendant to merely allege that the plaintiff is poor. This kind of allegation is tantamount to mere speculation on the part of the defendant.

To confound the matter further, the defendant has neither alleged nor proved that the plaintiff company is insolvent. No evidence, let alone sufficient evidence was adduced by the defendant to show that the plaintiff is insolvent. In the defendant's first affidavit annexing the Registry of Companies search report as exh LAK 4, it shows that the plaintiff is solvent. At any rate, the plaintiff has expressly averred in para 9 of the plaintiff's affidavit in encl 79 that the plaintiff is willing to allow the defendant to make payment into court or to the plaintiff's solicitors as stakeholders until the defendant's appeal to me was disposed off. It must be borne in mind that in the words of Mahadev Shankar J in *Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* at p 397 of the report at para H that:

> ... a stay of execution of a money judgment will be automatic in all cases where that money is in court.

(h) That the defendant is unable to pay and that its only asset is Lot 4451, and its belief that the plaintiff will take steps to proceed with the seizure of the said land

The stand of the defendant was indeed unpredictable. On the one hand, the defendant alleged that the plaintiff will dissipate payment of the judgment sum if the money is paid to the plaintiff. On the other end, the defendant argued that it is unable to pay its debts. Faced with this dilemma, the plaintiff rightly pointed out that it would be an outright denial of justice for the plaintiff who is entitled to the fruits of its litigation to be forced to bear the burden of the defendant for the benefit of the defendant.

It was submitted that the defendant was not candid in respect of its financial position because the defendant had not produced any other evidence to prove its actual financial position.

The defendant's concern was its land — Lot 4451. That piece of land was easily quantifiable and could be recovered in monetary terms. It is germane, at this juncture, to reproduce the sage words of Abu Mansor JCA in *Tropiland Sdn Bhd v DCB Bank Bhd & Ors* [2000] 2 MLJ 65, particularly at pp 68–69 of the report:

> It was plain to us that if a stay was refused no irreparable harm would befall the plaintiff. The easily quantifiable rentals would still eventually go to the applicant via the receivers and managers, less of course of what the appellant owe the respondents. In that way no prejudice is caused to the plaintiff if stay is not granted by us.
>
> We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.
>
> In coming to our decision, we agreed with counsel for the first respondent that any loss suffered by the plaintiff can be easily quantified. In the event that

the respondents were to lose in the appeal then the plaintiff could recover from the respondents what they have lost as damages are quantifiable and therefore recoverable. We fail to see how the plaintiff's appeal would be rendered nugatory if it were to succeed in its appeal.

(i) Whether the appeal would be rendered nugatory.

As I said, the land can be quantified and recoverable, in the event the plaintiff lost in the Court of Appeal. There was no affidavit evidence to show that the defendant's appeal to the Court of Appeal would be rendered nugatory by the execution of the damages awarded to the plaintiff. Just like Abu Mansor JCA in *Tropiland Sdn Bhd v DCB Bank Bhd & Ors*, I too found it hard to apprehend as to how the defendant's appeal would be rendered nugatory if it were to succeed in its appeal.

(j) Failure on the part of the learned SAR to take into account the relevant principles of assessment of damages

To challenge the validity or correctness of a judgment cannot be construed as a special circumstance to warrant a stay (*Tac Construction & Trading v Bennes Engineering Bhd (No 2)* [1999] 2 CLJ 518, at pp 537–538). In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131, the Federal Court approved and vigorously applied the decision of the English Court of Appeal in the case of *Monk v Bartram* [1891] 1 QB 346 which held that allegations of misdirections on the part of the court are not special circumstances on which the court will grant the application for a stay.

Enclosures 75 and 77 dismissed.

Reported by Lim Lee Na